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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-1943

HOWARD KEITH THOMPSON,

Petitioner,

v.

[redacted] NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA,

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Petitioner Howard Keith Thompson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered in this proceeding on March 16, 1979.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court is reported at 296 N.C. 703, 252 S.E.2d 776, and is reproduced in Appendix A.

The opinion of the North Carolina Court of Appeals is reported at 37 N.C. App. 628, 246 S.E.2d 827, and is reproduced in Appendix B.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on March 16, 1979. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTION PRESENTED

Whether a police officer who intruded into an occupied van parked in a public area without probable cause or even reasonable suspicion based on specific facts to believe that the particular van or its occupants had been involved in criminal activity committed an unconstitutional search and seizure.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "(N)or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was convicted in the Superior Court of New Hanover County, North Carolina, of the felonious possession of hashish. During the trial petitioner made a timely motion to exclude the hashish as evidence against him on the ground that it was obtained in an unconstitutional search and seizure. The trial court denied that motion and admitted the hashish into evidence. Petitioner appealed his conviction to the

North Carolina Court of Appeals and assigned the unconstitutional admission of that evidence as error. With one judge dissenting, the North Carolina Court of Appeals affirmed petitioner's conviction. On appeal to the North Carolina Supreme Court, petitioner again assigned the unconstitutional use of that evidence as error. The North Carolina Supreme Court also affirmed petitioner's conviction with one justice dissenting.

The Wilmington Azalea Festival is an old and well-known celebration of spring and the blossoming of azaleas that attracts tens of thousands of people to New Hanover County on the North Carolina coast. Many young people travel to the festival and sleep there in van-type motor vehicles.

While the festival was in progress, petitioner and five other persons were in a van equipped with sleeping bags in a parking area open to the public near a well-lighted boat landing in the Fort Fisher area of New Hanover County. At 12:30 a.m. on April 17, 1977, two officers of the New Hanover County Drug Squad were on patrol in a law enforcement vehicle in that area. As they approached the boat ramp the officers observed the van and a motorcycle about 40 yards

away from them and slightly to their left. As the officers stopped their own vehicle, they saw the van and motorcycle move ahead slightly and lawfully park so that they were not directly in front of the officers' vehicle.

Earlier in the evening the officers had heard reports of break-ins having occurred in the Fort Fisher area involving the use of a van, but nothing connecting this particular van or its occupants with any break-ins or other unlawful activity.

The officers remained stationary for about five minutes and watched the six people around the van and motorcycle. They saw no unlawful behavior or suspicious activity. Nevertheless, the officers drove their vehicle to the side of the van, beaming its bright lights onto the van. The passenger door of the van was open and the inside light was on. Petitioner was seated in the right front passenger seat. Another person was in the driver's seat and the other four were in the rear portion of the van.

One of the officers approached the van for the purpose, he testified, of identifying the people inside. At the passenger side of the van, the officer

asked petitioner for identification. Petitioner immediately produced identification papers, and the officer told him to get out of the van. Petitioner complied. The officer did not, however, look at the papers that petitioner had given him. Instead he asked the driver for identification. As the driver was reaching into his back pocket for identification, the officer -- without waiting for the papers to be handed to him -- leaned inside the van so that his body was across the now empty passenger seat. Once inside the van the officer looked into a recessed area of the dashboard were a glove compartment might be located. There he noticed several small tinfoil packets. He testified that one of the packets was open and that he saw inside it a brittle brown substance that he believed to be hashish. He seized the packets and arrested all six persons in the van for its possession.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA UPHOLDING THE SEARCH AND SEIZURE AS CONSTITUTIONAL IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The conduct of the narcotics officer in this case consisted of an escalating

series of intrusions upon the privacy of petitioner and the other persons in the van, beginning with the officer's surveillance of their activities, followed by his approach to the van beaming his bright lights into it and then his request for petitioner's identification, continuing with his order that petitioner get out of the van, and culminating with his intrusion into the van, looking into its recessed area and seizing the tinfoil packets. In upholding the constitutionality of that course of conduct, the North Carolina Supreme Court majority relied on Terry v. Ohio, 392 U.S. 1 (1969), and held that it was not unreasonable for the officers to infer that the occupants in the van "might be in some way connected with the reports of recent break-ins in the vicinity," 296 N.C. at 707, 252 S.E.2d at 779, in view of their presence at a late hour in a public parking area in an isolated region of the county in a van with the front passenger door and the side door open. 296 N.C. at 707, 252 S.E. at 779. Indeed, the court held that even without the reports of recent breakins the circumstances justified "a reasonable suspicion that the occupants of the van might be engaged in or connected with criminal activity." 296 N.C. at 707, 252 S.E.2d at 779. As the dissenting justice pointed out, the majority took no

account of the reasonable explanation for the van's presence in the area in view of the thousands of young people who were attending the festival in vans.

The decision ignores the critical constitutional requirement for particularized information as the basis for a law enforcement intrusion on the reasonable expectation of privacy of a citizen. The "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourt Amendment jurisprudence." Terry v. Ohio, supra at 21, n. 18. Earlier this term in Delaware v. Prouse, 99 S.Ct. 1391 (1979), this Court emphasized that "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test," insisting "upon 'some quantum of individualized suspicion.'" 99 S.Ct. at 1396. Similarly, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court repeatedly stated that, even if a standard of "founded suspicion" rather than probable cause might apply, that lesser standard could be satisfied only by information pointing to a "particular vehicle." 422 U.S. at 881, 882; see also, United States v. Martinez-Fuerte, 428 U.S. 543, 555-556 (1976).

In the present case, the officer approached the van in connection with his patrol assignment to general narcotics investigation. He had heard reports of break-ins involving the use of a van, but had no basis to connect this particular van with any criminal activity. He observed the van for five minutes. He saw that it was lawfully parked in a well-lighted public place during a time that many visitors to the festival in the area had travelled there and were sleeping in vans. He saw no unlawful behavior or suspicious activity on the part of any of the occupants of the van. Undoubtedly, petitioner and his companions had a reasonable expectation of privacy in their van, which they had earlier used for transportation and were then using as a temporary home -- a shelter and a repository for their personal effects positioned in a remote place to avoid public view. See Delaware v. Prouse, supra at 1400-1401; cf., United States v. Chadwick, 433 U.S. 1, 12 (1977); Cardwell v. Lewis, 417 U.S. 583, 590 (1974). The officer intruded upon that privacy without any "individualized suspicion," let alone probable cause, pointing to criminal activity by petitioner or his companions, and therefore engaged in an unconstitutional search and seizure. As the dissenting justice reasoned:

"I simply cannot conclude, as the majority does, that the mere existence of this van and its occupants at the location described somehow gives rise to a reasonable suspicion that criminal activity was afoot. Neither do general reports of unspecified 'break-ins' in the area involving an unspecified van of which the officers had no description give rise to a reasonable suspicion that this van and these persons were engaged in such activity." 296 N.C. at 709, 252 S.E.2d at 780.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the North Carolina Supreme Court.

Respectfully submitted,

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APPENDIX A

STATE of North Carolina

v.

Howard Keith THOMPSON, Jimmie Dale Hardee.

No. 87.

Supreme Court of North Carolina

March 16, 1979.

This case is before us on appeal from a decision of the Court of Appeals affirming the Judgment of Superior Court, New Hanover County, finding both defendants guilty of felonious possession of hashish. The opinion of the Court of Appeals was by Britt, Judge, with Clark, Judge, concurring and Erwin, Judge, dissenting. Defendants appealed as a matter of right under G.S. §7A-30(2). This case was argued as No. 112 at the Fall Term 1978.

The factual occurrences underlying the convictions of the defendants are amply set out in the opinion of the Court of Appeals at 37 N.C.App. 628, 246 S.E.2d 827 (1978) and will be restated here only in connection with our consideration of

appellants' assignments of error.

Our discussion of the various assignments of error raised by defendants is limited to their common assignment of error to the trial court's refusal to suppress evidence relating to and stemming from the discovery by the investigating officers of a quantity of hashish in an open, recessed area in the dashboard of the van in which the defendants were located at the time the officers approached them. The other assignments of error raised by defendants have been given careful consideration, but we find them to be without merit. Therefor, we affirm and adopt that portion of the opinion of the Court of Appeals directed to them.

The determinative issue with respect to appellants' assignments of error to the admission of evidence relating to and stemming from the discovery of the hashish is whether the initial intrusion by the officers, which put them in a position to see the hashish which they seized, infringed defendants' rights under the Fourth Amendment to the U. S. Constitution. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), clearly established that objects in the plain view of an officer who has a right to be in the position to have that view may be seized without obtaining a search

warrant. Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 1067 (1968). "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Coolidge v. New Hampshire, supra, 403 U.S. at 466, 91 S.Ct. at 2038, 29 L.Ed. at 583.

Testimony by the officers who arrested defendants, given at a voir dire, pretrial hearing, indicated: In the early morning hours of 17 April 1977 at approximately 12:30 a.m., Officers Wolak and Lee, members of the Narcotics Bureau of the New Hanover County Sheriff's Department, were on patrol in the Fort Fisher area of New Hanover County. They pulled their car off the highway and parked in the lighted parking lot of a public boat landing located near Fort Fisher. The officers observed a motorcycle and a van parked near them. The van and the motorcycle were then moved away from the officers approximately 40 yards. The officers observed six persons in and around the van. Earlier that evening the officers had heard reports of break-ins having occurred in the Fort Fisher area involving the use of a van. Believing the situation warranted investigation, the officers approached the van, driving their car directly up to the side of the van with

the car's bright lights on. The interior light in the van was on. The passenger door and the side door of the van were open, and the officers observed two males seated in the two front seats of the van and four persons in the rear. Officer Wolak identified himself and approached the van. He asked the individual seated in the passenger seat in the front of the van, subsequently identified as defendant Thompson, for some identification. As he took the identification defendant Thompson proffered, Officer Wolak asked Thompson to step from the van. After defendant Thompson complied with this request, Officer Wolak asked the individual seated in the driver's seat of the van to produce some identification. As the driver reached in his pocket for his identification, Officer Wolak leaned across the empty passenger seat to get the identification from him. As he did so, he noticed several tinfoil wrappers, one of which was open, in an open, recessed area of the dashboard in front of the passenger's seat where a glove compartment would normally be located. Officer Wolak, whom the court found to be an expert in the identification of narcotics, recognized the substance lying inside the open tinfoil wrapper to be hashish. The court's findings of fact conformed to the testimony of the officers, and the hashish and other evidence discovered as a result of the ensuing arrest and search

of the individuals in the van was admitted over objection by the defendants.

Coleman, Bernholz & Dickerson by Steven A. Bernholz and Patricia Stanford Hunt, Chapel Hill, for defendant-appellant Thompson.

Burney, Burney, Barefoot & Bain by Roy C. Bain, Wilmington, for defendant-appellant Hardee.

Atty. Gen., Rufus L. Edmisten by Lucien Capone, III, Associate Atty. Gen., Raleigh, for the State.

BROCK, Justice.

We observe first that it is problematic whether the officers' conduct in this instance constituted a "seizure", thus invoking the protection of the Fourth Amendment. "'No one is protected by the Constitution against the mere approach of police officers in a public place.' United States v. Hill, 340 F.Supp. 344 (E.D.Pa. 1972)." State v. Streeter, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973). Because we consider the officers' conduct to be constitutionally permissible under the standards governing an actual "seizure", however, our consideration will proceed on the assumption the officers indeed effected a "seizure" of the occupants of the van.

[1,2] The officers' conduct in this instance is governed by the standards set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct., 1868, 20 L.Ed.2d 889 (1968). Terry involved the constitutionality under the Fourth Amendment of a "stop and frisk" by a police officer. Because there was no "frisk" in this case, we examine only whether the officers were entitled to approach and detain the occupants of the van for purposes of investigation and the reasonableness of their conduct in doing so. The Supreme Court's analysis in Terry was "a dual one - whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 20, 88 S.Ct. at 1879, 20 L.Ed.2d at 905. The standard set forth in Terry for testing the conduct of law enforcement officers in effecting a warrantless "seizure" of an individual is that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." Id. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906. In Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612, 617 (1972), the Court reaffirmed the principle of Terry that "[a] brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most

reasonable in light of the facts known to the officers at the time." The standard set forth in Terry and reaffirmed in Adams clearly falls short of the traditional notion of probable cause, which is required for an arrest. We believe the standard set forth requires only that the officer have a "reasonable" or "founded" suspicion as justification for a limited investigative seizure. United States v. Constantine, 567 F.2d 266 (4th Cir. 1977); United States v. Solomon, 528 F.2d 88 (9th Cir. 1975). Thus we must examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of the occupants of the van and the rational inferences which the officers were entitled to draw from those facts. In doing so, however, we do not believe the circumstances should be analyzed in isolation, but that they should be viewed as a whole "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." U. S. v. Hall, 174 U.S.App.D.C. 13, 15, 525 F.2d 857, 859 (1976).

[3] Relying on the findings of fact on voir dire which are supported by competent evidence and thus conclusive, State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974), on what facts and inferences was the officers' conduct predicated? The van and a motorcycle were located in a public parking area in an isolated region of New

Hanover County at the end of State Highway 421. The hour was late, approximately 12:30 a.m. The officers were aware that break-ins involving a van had been reported recently in the vicinity. The front passenger door and the side door of the van were observed to be open. A not unreasonable inference to be drawn from these empirical facts was that the occupants of the van might be in some way connected with the reports of recent break-ins in the vicinity. Indeed, even absent the reports of recent break-ins, given the late hour, the isolated location of the van in a public place, and the considerable activity around it observed by the officers, the inference might reasonably be drawn that the situation warranted investigation. These facts and the reasonable inferences to be drawn, when viewed as a whole and through the eyes of experienced police officers, would, we believe, justify a reasonable suspicion that the occupants of the van might be engaged in or connected with criminal activity. On that basis, we find that the officers acted within the limits of the Fourth Amendment in approaching the van and seeking identification from the occupants.

[4] Appellants further contend, however, that Officer Wolak's act of leaning into the van through the open front passenger door after defendant Thompson had stepped from the vehicle constituted an

unreasonable intrusion of their expectation of privacy and thus a violation of their Fourth Amendment rights. With this contention we cannot agree. Officer Wolak's purpose in leaning into the van and reaching across to the driver was to obtain the identification the driver had been asked to show him. It was this act which put Officer Wolak in a position to observe, in plain view, the hashish. We cannot say, however, that the officer's conduct was unrelated in scope to the circumstances which justified the initial approach to investigate. Terry v. Ohio, supra. The court found as a fact that Officer Wolak asked defendant Thompson to step out, and Thompson voluntarily complied with that request. From the position in which Officer Wolak was standing we cannot say it was unreasonable for him to reach across the seat for the driver's identification. See United States v. Anderson, 552 F.2d 1296 (8th Cir. 1977) United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974). Therefor Officer Wolak had a right to be in the position he was in when he discovered, in plain view, the hashish. Evidence of that discovery and other evidence subsequently discovered as a result was properly admitted. The opinion of the Court of Appeals is AFFIRMED.

BRITT, J., took no part in the consideration or decision of this case.

EXUM, Justice, dissenting:

I fully agree with the majority's analysis of the legal problem presented. The majority has correctly identified the applicable legal principles by which the conduct of the police officers here must be judged. There was, in my view, a seizure of the occupants of the van, particularly the defendant Thompson, pursuant to which Officer Wolak got himself in a position to observe the hashish "in plain view" inside the van. The majority so assumes.

The question, therefore, is whether this seizure was justified under the circumstances present here. The majority concludes that it was. It is with this conclusion that I disagree. The state has shown no "specific and articulable facts," Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), giving rise to inferences which in turn could form the basis of a reasonable or founded suspicion even through the eyes of reasonable and trained officers that the occupants of the van might have been engaged in particular criminal activity so as to justify the officers' intrusion.

It is important first to note that at the time of this incident the Wilmington Azalea Festival, an old and well-known celebration marking the coming of spring and the blossoming of azaleas, was in progress. The festival attracts tens of thousands of people to the area. Overnight accomodations are at an expensive premium and thousands of young people opt for traveling and sleeping in van-type motor vehicles as the young people in this case were obviously doing in a parking area open to the public at large. The occupants of the van were equipped with sleeping bags. The parking area was at the very end of U. S. Highway 421 close to a boat ramp - a natural place under the circumstances to settle in for the night.

I simply cannot conclude, as the majority does, that the mere existence of this van and its occupants at the location described somehow gives rise to a reasonable suspicion that criminal activity was afoot. Neither do general reports of unspecified "break-ins" in the area involving an unspecified van of which the officers had no description give rise to a reasonable suspicion that this van and these persons were engaged in such activity.

The majority relies on Terry v. Ohio, supra, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889, and Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Both

these cases are distinguishable. In Terry a policeman of some 39 years experience observed three men standing on a corner for ten to twelve minutes. Two of them took turns walking down the street to a particular store and looking in the window. They would then return and confer. This pattern was repeated ten to twelve times. This behavior led the officer to believe they were planning a robbery. They were, in his words, "'casing a job, a stick-up.'" Id. 392 U.S. at 6, 88 S.Ct. at 1872. Upon going to them to investigate, the officer frisked defendant Terry, found a gun on him and placed him under arrest. The United States Supreme Court concluded that his actions were reasonable and justified under the Fourth Amendment.

Likewise, in Adams v. Williams, supra, there was a reasonable suspicion that a suspect had committed, or was about to commit, a particular crime. In Adams a police officer was on patrol in a "high-crime neighborhood." He received a tip from an informant that an individual seated in a nearby car was carrying narcotics and had a gun at his waist. On approaching the car, the officer reached in and removed a loaded revolver from the individual's waistband. He then placed him under arrest and upon searching the car found other weapons and narcotics. Again, his actions were found sustainable under the

Fourth Amendment.

In both Terry and Adams, police officers were possessed of specific facts which indicated that specific individuals might have committed or were planning to commit particular crimes. While these facts were not considered sufficient to rise to the level of probable cause, they were enough to give rise in each case to a reasonable suspicion in the officers' minds. There are no such facts in this case.

This case is instead quite like United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), which I believe controls it. There officers of the Border Patrol were on lookout near the Mexican border late at night for illegal aliens. They pursued defendant's car and stopped it, finding two illegal aliens in it. Defendant was arrested and convicted for transporting illegal immigrants. Aside from the facts that it was late at night and near the border (i.e., at a time and place where such illegal activity would normally occur), the only reason the officers could articulate for having pursued and stopped the car was that the occupants appeared to be of Mexican descent. On appeal, the United States Supreme Court reversed defendant's conviction. It held: (1) while Border Patrol officers could make roving-patrol stops they had to have a reasonable suspicion to do so; and (2) while appearance

of Mexican descent was a relevant factor it was not under these circumstances justification for a stop.

In the case at bar, the officers were unable to point to any untoward activity on the part of the individuals involved as the officers in both Terry and Adams were able to do. Instead they could articulate only a generalized suspicion based apparently on the time, the place, and the facts that "a van" was involved and they had reports of unspecified "break-ins" involving a van in the area. Lacking more specific information about the break-ins which would tie this particular van or even one fitting its description to the "break-ins," the officers here had no more reason to suspect criminal activity than the Border Patrol in Brignoni-Ponce.

For these reasons I believe there was error in failing to allow defendants' motion to suppress the hashish seized and I vote for a new trial.

APPENDIX B

37 N. C. App. 628

STATE of North Carolina

v.

Howard Keith THOMPSON, Jimmie Dale Hardee.

No. 775SC1064.

Court of Appeals of North Carolina

Aug. 29, 1978.

Upon pleas of not guilty defendants were tried on bills of indictment charging them with felonious possession of more than one-tenth of an ounce of hashish. Evidence presented by the State tended to show:

At approximately 12:30 a.m., on 17 April 1977, Officers William Wolak and W. A. Lee of the Narcotics Bureau of New Hanover County Sheriff's Department, were on routine patrol in the Fort Fisher area of said county. At a public boat ramp in the area they observed a parked van and a motorcycle.

A voir dire was held during which Wolak testified that the passenger door

on the right-hand side of the van was open and the interior light was on; that he and Lee approached the van in order to identify the occupants because it was late at night and break-ins had been reported in the vicinity; that they approached the van from its right side and the headlights of their car shined into the van; and that defendant Thompson was sitting in the passenger seat of the vehicle. The trial court found facts in accord with Wolak's testimony and allowed him to identify defendant Thompson.

Wolak testified before the jury that he got identification from Thompson and asked him to step out of the van; that he then "leaned across the empty passenger seat" in order to get identification from the driver; that there was an open, recessed area in the dash in front of the passenger's seat; that while he was leaning into the van he noticed tinfoil packets in the recessed area; and that one of the packets was open and contained a brown substance which he identified as hashish. A voir dire was held at the conclusion of which the trial court refused to suppress evidence relating to the hashish.

The trial court further found, based on Wolak's testimony, that Thompson was arrested and advised of his rights after discovery of the hashish and that Thompson then volunteered the statement that all

of the "stuff" was his and that he did not want to get anyone else in trouble. Wolak further testified that Thompson and the driver were sitting in the front seats; that there was a large, open area behind the seats some ten feet from where the hashish was found; that defendant Hardee was lying in the back; that Hardee's wife and two others were also in the back of the van; and that all occupants of the van were arrested.

Officer Lee testified that he searched Hardee after his arrest and found in his pocket a packet of green vegetable matter which a chemist testified contained "point six-tenths of a gram of hashish." The chemist also testified that a packet found in the dash contained 94.2 grams of hashish. Motions to suppress were denied.

Neither of the defendants testified but defendant Thompson presented three witnesses. One of them, his mother, testified that defendant Hardee was married to Thompson's sister, that Thompson lived in Florida and his sister lived in the Fayetteville (N.C.) area; and that Thompson left Florida by plane to visit his sister several days before the incident in question.

Another witness, James Gentry, testified that he and his wife went to the

Wilmington area with defendant Hardee and his wife; that the four of them went on motorcycles; that the Hardees had two vans and defendant Thompson was going to Wilmington in a van that the witness had seen the Hardees use. On cross-examination by Hardee's attorney, Gentry testified that he and Hardee reached Carolina Beach on the motorcycles; that Hardee crashed his bike against the curb and hurt his leg; that thereafter they saw Thompson with the van; and that they loaded Hardee and his bike in the van and eventually arrived at the place where they were arrested. When asked if there was a tray or little receptacle area on the dashboard, Gentry answered that he was not familiar with "Jimmy's (Hardee's) van". The witness further stated: "I know that Jimmie Hardee did not have a sleeping bag on his bike, but I don't know if there was anything else. That was all in the van."

The jury found each defendant guilty of felonious possession of hashish and from judgments imposing prison sentences of 18 months, defendants appealed.

Atty., Gen. Rufus L. Edmisten by Associate Atty. Gen. Lucien Capone, III, Raleigh, for the State.

Parker, Rice & Myles by William G. Hussman, Jr., Wilmington, for defendant appellant Thompson.

Burney, Burney, Barefoot & Bain by Roy C. Bain, Wilmington, for defendant appellant Hardee.

BRITT, Judge.

Both defendants contend the court erred in admitting into evidence the tinfoil-wrapped packages of hashish seized from the recessed tray beneath the dashboard of the van. They argue that the seizure was not made pursuant to a search warrant, nor was it justified by a probable cause-exigent circumstances exception to the warrant requirement or by the "plain-view" doctrine. We find no merit in this contention.

When defendants objected to evidence relating to the hashish found beneath the dash, the court conducted a voir dire hearing in the absence of the jury. Following the hearing, the court found as facts that on the occasion in question Officer Wolak was riding in a law enforcement vehicle; that there had been some break-ins in that area; that in the course of an investigation, the law enforcement vehicle was driven up to the van in question; that Wolak got out of his vehicle, identified himself as a law enforcement officer, approached the van and asked the persons therein to step out and identify themselves; that he "reached across the front seat of the van towards the driver to see

the driver's identification, and while doing so, he saw three tinfoil packets in an open compartment under the dashboard of the van; that these three tinfoil parcels were in plain view; that Mr. Wolak is an expert in the identification of narcotics;" and that he formed the opinion that the contents of the tinfoil parcels, one which was open, was hashish.

[1] Findings of fact supported by competent evidence on voir dire are conclusive on appeal. State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974); State v. Pike, 273 N.C. 102, 159 S.E.2d 334 (1968). We have examined the record and conclude that there was ample evidence to support the court's findings. We now consider whether the facts found will support the admission of evidence seized without a warrant.

[2-6] We think the plain view doctrine applies in this case. Under circumstances requiring no search because the item is in plain view, no constitutional immunity from unreasonable search and seizure arises. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977); State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970). The plain view doctrine requires that the officer seizing the contraband be in a place where he has a right to be and that the seized item be plainly visible to him

without further searching into an area where the party from whom the item is seized has a reasonable expectation of privacy. 11 Strong's N.C. Index 3d, Searches and Seizures, §§ 5-6, and cases cited therein.

Chief Judge Mallard, writing for this court, quoted from Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in which it is said that "[w]hat the plain view cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." State v. Fry, 13 N.C.App. 39, 45, 185 S.E.2d 256, 260 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514 (1972). In Fry the police officer was investigating a traffic violation and opened the door of a van to see the occupants therein. When he did this, he saw that one of them was holding a bag of marijuana. The marijuana was later admitted into evidence.

Defendants contend that the case sub judice is distinguishable from Fry in that Officer Wolak was not investigating a traffic violation and therefore had no prior justification for looking inside the van. Clearly, this argument is erroneous.

A police officer who observes a van or other vehicle in an isolated place late at night, knowing that break-ins have been reported in the area, is justified in stopping it to determine its ownership and the identity of its occupants. State v. Bagnard, 24 N.C.App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975). In Bagnard a highway patrolman investigating a hit-and-run incident in the area stopped an automobile similar to the one reportedly involved therein. When the driver of the vehicle was unable to produce a registration card, the officer opened the car door to obtain the registration number from the tag attached there. When the door was opened, the officer discovered a bag of marijuana on the floor. The seizure of the marijuana and its subsequent admission into evidence was upheld as the officer was in a place where he had a legal right to be and had inadvertently discovered the contraband. Similarly, Officer Wolak was properly in a place where he had a legal right to be.

Defendants, relying on State v. Blackwelder, 34 N.C.App. 352, 238 S.E.2d 190 (1977), argue that the contraband seized in this case was not in plain view and, therefore, not inadvertently discovered. Their reliance on Blackwelder is misplaced.

In Blackwelder the officers rummaged under the seat of a stopped automobile

discovered a controlled substance. Here, Officer Wolak simply observed hashish lying on tinfoil in an open tray in a recessed area of the van's dash. This was an inadvertent discovery rather than a search. "'[T]he term [search] implies some exploratory investigation or an invasion and quest, a looking for or seeking out. The question may be secret, intrusive, or accomplished by force.' 79 C.J.S. Searches and Seizures § 1, p. 775." State v. Reams, 277 N.C. 391, 396, 178 S.E.2d 65, 68 (1970). Officer Wolak conducted no forceful, intrusive or secretive investigation. Rather, he merely seized an illegal substance lying openly before him.

We hold that the two-pronged test of Coolidge v. New Hampshire referred to in State v. Fry, supra, has been met in this case. The police officer making the seizure here was in a place where he had a right to be and inadvertently discovered the contraband.

[7,8] Defendant Hardee asserts error in the admission of the hashish seized from his pocket. The gist of his argument is that the initial seizure of narcotics from the van was illegal, that absent such seizure there was not any probable cause to arrest him, and that the post-arrest search of his person in which the additional contraband was discovered was tainted by the prior illegality.

Our consideration of this assignment is governed by our resolution of the first issue in this case. Because the initial seizure was valid, Hardee and the other occupants of the van could properly be arrested. Discovery of the hashish gave Officer Wolak sufficient probable cause under N.C.G.S. §15A-401 to justify this action. Once a person is placed under arrest, he may be searched thoroughly. State v. White, 18 N.C.App. 31, 195 S.E.2d 576, cert. denied, 283 N.C. 587, 196 S.E.2d 812 (1973). Evidence obtained in such a search is inadmissible only if the initial arrest is improper. Since Hardee was arrested in accordance with the law, this evidence was properly admitted against him.

[9,10] Defendant Thompson contends that the incriminating statement made by him at the time of the seizure of the contraband was improperly admitted into evidence as he had not been advised of his rights as required by Miranda v. Arizona, 384 U.S. 436, 84 S.Ct. 1758, 16 L.Ed.2d 694 (1966).

The evidence presented on voir dire supports the court's finding that Thompson's statement was voluntary and was not made in response to interrogation. Such a statement is admissible whether or not the court finds that the defendant has been apprised of his rights. State v. Jackson, 280 N.C. 563, 187 S.E.2d 27

(1972). "[W]here there is evidence that admissions were freely and voluntarily made without inducement by promises, threats, or coercion, reception of the admission in evidence will not be held error. . . ." 4 Strong's N.C. Index 3d, Criminal Law §75.9, p. 320.

[11] Defendant Thompson contends that the court improperly admitted evidence relating to Officer Wolak's identification of him. He contends the officer had insufficient opportunity to observe and identify him. We find no merit in this contention.

After defendant's objection to the identification the trial judge conducted a voir dire at which he found that Officer Wolak had ample time and opportunity to observe defendant Thompson. Examination of the record of the voir dire, viewed in the light most favorable to the State, reveals that Officer Wolak observed Thompson from a distance of 40 or 45 yards for approximately five minutes under light provided by a streetlight and the interior lights of the van. He then drove to within twenty feet of the van and observed Thompson by light from the high-beam bulbs of his automobile directed into the open doors of the van. Subsequently, he walked up to the van and observed Thompson at arm's length for several minutes while talking to him. We hold that the court

properly admitted the identification testimony as Officer Wolak had adequate opportunity to observe and identify Thompson.

[12-18] Both defendants contend the trial court erred in denying their motions for nonsuit. This contention has no merit.

Where there is more than a scintilla of evidence to support the allegations of the indictment, the motion for nonsuit is properly denied. Conflicts and contradictions within the testimony must be resolved by the jury. State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975). In a case such as the one presently considered, the State may overcome a motion for nonsuit by presenting evidence establishing the defendant's close proximity to the drug as well as incriminating circumstances or facts from which the jury might infer that the defendant has reduced the narcotic to his possession. State v. Weems, 31 N.C.App. 569, 230 S.E.2d 193 (1976). The defendant's possession may be actual or constructive. State v. Bagnard, supra.

In Thompson's case the State's evidence was clearly sufficient to withstand a motion for nonsuit. The testimony offered, if believed by the jury, established that Thompson was seated in the passenger seat in the front of the van very close to the tray from which the hashish was taken.

In addition, he voluntarily told the arresting officer that "the stuff was his and he didn't want anyone else in trouble." The illegal substance was in plain view. Defendant's location near the contraband and the additional facts introduced into evidence justified the denial of his motion for nonsuit.

In Hardee's case, evidence that he owned the van and was present therein when the controlled substance was found was sufficient to allow the jury to infer that he had the power and intent to control the contraband found there. Ownership of premises where drugs are found is sufficient to require submission of the issue of possession to the jury. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

[19] Defendant Thompson contends the court erred in giving the following instruction to the jury:

> "As I told you, if hashish is in plain view of a person then you could infer from that he has both the power and intent to control it, and that would be constructive possession. You are not required to infer that he had the power and intent to control it, however. You will consider that along with all the other evidence in determining whether he had the power and intent to control it and there take constructive possession."

We concede that the first sentence in the quote instruction, standing alone, may not be a correct statement of law. However, when the instruction is considered in context and in light of the evidence tending to show that defendant Thompson was sitting in the front passenger seat of the van directly in front of the open recessed area where the hashish was found, and that he stated shortly thereafter that the "stuff" was his, we perceive no error prejudicial to him.

In support of this contention, defendant Thompson relies on State v. Washington, 33 N.C.App. 614, 235 S.E.2d 903 (1977), and State v. Weems, supra. We find it easy to distinguish those cases from the case at hand.

We hold that defendants received a fair trial, free from prejudicial error.

No error.

CLARK, J., concurs.

ERWIN, J., dissents.

ERWIN, Judge, dissenting:

I vote to grant the defendants a new trial. I feel the motion to suppress the evidence should have been allowed. The record clearly shows: the van in question was parked in a public area near Fort Fisher at the end of Highway 421 in the area of the Wildlife Boat Camp. The boat landing is an open area with several street lights and borders on the water.

The record before us does not show that the defendants were violating any laws of the State at the time they were being observed by the officers, Wolak and Lee. There is not any indication that the defendants were acting in any suspicious manner, nor were they wanted for the commission of any crimes. On voir dire, Officer Wolak testified that he and Lee approached the van in order to identify the occupants, because it was late at night and break-ins had been reported in the vicinity earlier that evening. But the record does not disclose the time of the break-ins, the description of the van allegedly connected with the break-ins, or that the officers ever asked for or received either the registration card of the van in question or the driver's license.

The van had not been stopped pursuant to G.S. §20-183(a). In such cases as State v. Smith, 289 N.C. 143, 221 S.E.2d 247

(1976), the defendant was driving his motor vehicle in a careless and reckless manner; in State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973), defendants were stopped to determine the validity and presence of the driver's license and registration card; and in State v. Fry, 13 N.C.App. 39, 185 S.E.2d 256 (1971), cert. denied and appeal dismissed, 280 N.C. 495, 186 S.E.2d 514 (1972), the police officer was investigating a traffic violation, opened the door of a van, and saw in plain view a person holding a bag of marijuana. In State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977), our Supreme Court held that a pistol found in a Plymouth was properly admitted into evidence on the "plain view" doctrine where the evidence showed that the butt end of the pistol was readily visible to Officer Jarrell as he stood outside the Plymouth.

In State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970), our Supreme Court held that the "plain view" doctrine applied when an officer removed a piece of chrome strip from the exterior of the car in question. No interior search of the car was necessary.

I would hold that the conduct of Officer Wolak in reaching across the seat and looking in the recessed area of the van a search. "A search, even of an automobile, is a substantial invasion of

privacy." United States v. Ortiz, 422 U.S. 891, 896, 95 S.Ct. 2585, 2588, 45 L.Ed.2d 623, 629 (1975). The motion to suppress should have been allowed.

Supreme Court, U. S.
FILED
SEP 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 78-1943

HOWARD KEITH THOMPSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DI CESARE - Printing — 331-4141 — Washington, D.C. 20004

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OPINIONS BELOW

The opinion of the North Carolina Supreme Court is reported at 296 N.C. 703, 252 S.E. 2d 776 and is appended to the petition.

The opinion of the North Carolina Court of Appeals is reported at 37 N.C. App. 628, 246 S.E. 2d 827 and is also appended to the petition.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Where a police officer has heard official reports that several break—ins have been comitted in an area and that a particular kind of vehicle was involved, and the officer subsequently observes such a vehicle parked in an isolated place in the vicinity at a late hour and where several persons are observed in and around the vehicle, does the minimal intrusion occasioned by the officer's request for identification and his act of reaching into the vehicle to retrieve that identification violate the Fourth Amendment's proscription against unreasonable seizures?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...Nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On August 22, 1977, petitioner was tried in the Superior Court of New Hanover County, North Carolina, on the charge of felonious possession of a controlled substance (hashish). During the trial, petitioner objected to introduction of the hashish asserting that it had been seized in violation of the Fourth Amendment's proscription against unreasonable searches and seizures as made applicable to the states by the Fourteenth Amendment. After conducting a *voir dire* hearing the trial court allowed the hashish to be introduced into evidence. Petitioner was convicted and was sentenced to 18 months imprisonment. The conviction was affirmed on appeal by both the North Carolina Court of Appeals with one dissent and the North Carolina Supreme Court, also with one dissent, those courts having held that the seizure was justified under the "plain view doctrine."

During the early morning hours (12:30 a.m.) of April 17, 1977, officers William Wolak and W.A. Lee of the New Hanover County Sheriff's Department, Narcotics Bureau were on routine patrol on Highway 421 which ends at a parking lot and boat ramp adjacent to historic Fort Fisher. Wolak and Lee pulled their unmarked car into the lot and saw a van and motorcycle parked near the water. There

were no other vehicles in the area. Shortly after Wolak and Lee parked their car, the van and motorcycle moved a distance of 35 to 40 yards and parked again. The officers watched the vehicle for a short time. The passenger door of the van, which was facing the officers, was wide open, as was the side door. The interior lights were on. Six people were observed in and around the van.

Earlier in the evening, Wolak and Lee had heard reports from the Sheriff's department that several break-ins had occurred in that area. The reports tied the break-ins to a van. Wolak knew that people camped at Fort Fisher and that the Azalea Festival was taking place. Wolak, an officer of eleven years experience, testified that the van and motorcycle were in a very suspicious location for that hour of the night. Believing, therefore, that the situation warranted some inquiry, Wolak and Lee drove up to the van. Officer Wolak got out of the car and walked over to the van, approaching the passenger side. Two persons were seated in the front seat and four were in the back. The passenger and side doors remained open. Wolak identified himself as a law enforcement officer and asked the person seated in the front passenger seat, later identified as petitioner, for identification. Wolak took petitioner's identification and requested that he step from the van. Petitioner did so. Wolak then asked the person seated in the driver's seat for his identification. Wolak leaned across the empty passenger seat to get the identification as the driver was pulling it from his pocket. In doing this, Wolak noticed several tinfoil packets lying on an open shelf under the dashboard in front of the passenger's seat. One of the packets was open, exposing a brittle brown substance which Wolak recognized from experience as hashish. The packets were seized

and petitioner and the other occupants of the van were placed under arrest. As this was happening, petitioner said, "The stuff is mine. I don't want to get anybody else in trouble."

REASONS FOR REFUSING TO ISSUE A WRIT OF CERTIORARI

The "plain view doctrine" provides that where a law enforcement officer inadvertently comes across contraband in plain view during the course of a prior valid intrusion the seizure of that contraband is not prohibited by the Fourth Amendment. *Coolidge v. New Hampshire,* 403 U.S. 443, 466, *reh. denied,* 404 U.S. 874 (1971).

Petitioner does not deny that the van was parked in a public place, that the doors were wide open, that the interior lights were on exposing the inside to any who might pass by or that the hashish lay in an open tinfoil packet on an open shelf of the dashboard on the passenger side. Of course, what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. *Katz v. United States,* 389 U.S. 347, 351 (1967).

Petitioner contends, however, that Officer Wolak obtained his view of the contraband by virtue of an invalid intrusion. He asserts that Officer Wolak's request for identification and the act of reaching across the passenger seat to retrieve that identification amounted to a "seizure" which was not predicated upon a "reasonable suspicion" that petitioner might be engaged in or connected with criminal activity.

Assuming that Officer Wolak's acts did constitute a seizure of petitioner, the Fourth Amendment requires a determination of whether that seizure was reasonable. The analysis "[I]s a dual one-whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio,* 392 U.S. 1, 20 (1968).

In making that analysis, a balancing test is employed which weighs the gravity of the public interest in crime detection and prevention served by the seizure against the severity of the interference with the individual's right to privacy. *Brown v. Texas,* 99 S. Ct. 2637, 2640 (1979). In practice, this balance has been struck along a continuum ranging from seizures akin to a traditional arrest, *Dunaway v. New York,* 99 S. Ct. 2248 (1979) or involving a stop and full search, *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), in which case probable cause is required, to routine vehicle stops at a fixed checkpoint for brief questions regarding illegal aliens, in which case no probable cause or reasonable suspicion to believe a crime has or is occurring is required. *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976). In between those extremes lie cases involving a brief stop, short of a traditional arrest for the purpose of investigating possible criminal involvement. *See, e.g. Brown v. Texas,* 99 S. Ct. 2637 (1979); *Delaware v. Prouse,* 99 S. Ct. 1391 (1979); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *Adams v. Williams,* 407 U.S. 143 (1972); *Terry v. Ohio,* 392 U.S. 1 (1968). Because of the limited nature of the intrusion in those situations, probable cause is not required. Instead, the balance is struck by requiring the officer to point to the specific and articulable

facts which taken together with rational inferences from those facts created a *reasonable suspicion* that the individual he detained may have been engaged in criminal activity. What constitutes a reasonable suspicion differs from case to case depending on the peculiar set of facts and circumstances.

In the case *sub-judice* the intrusion upon petitioner's right to privacy was minimal. The van in which petitioner was seated was parked in a public place with its doors wide open and its interior lights shining. Officer Wolak simply approached petitioner in this public place, asked for his identification and requested that petitioner step from the van. Petitioner voluntarily complied. There was no frisk until after the contraband had been seen in plain view and the arrest effected. Wolak did not draw a gun or threaten petitioner in any way. On the other hand the hour was late. There had been official reports of several break—ins in the vicinity involving a van. The van was parked in an isolated location which was otherwise deserted. Office Wolak, an experienced policeman, considered the location of the van as suspicious for that hour of the night. Several people were observed in and around the van. The van moved about 40 yards after Wolak and Lee pulled their unmarked car into the parking lot. While any one of those facts in isolation might not be a sufficient basis for inquiry, when viewed holistically, as they were, "[T]hrough the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training," *United States v. Hall,* 525 F.2d 857, 859 (D.C. Cir. 1976), investigation was clearly justified if not demanded.

Petitioner nevertheless argues that these facts were not sufficiently "individualized" to focus suspicion on him and

the particular van in which he was seated. However, if Officer Wolak's information had been any more specific, (e.g., a license number) he would have undoubtedly had probable cause to make an arrest. What this Court has consistently disapproved in cases such as *Brown v. Texas, Delaware v. Prouse*, and *Brignoni-Ponce*, is the complely random stop of individuals or a vehicle without any reason to suspect that a crime has been or is being committed or that the person stopped may have committed it. However, in disapproving such stops this Court did not impose a probable cause requirement on field investigations. *Terry v. Ohio,* 392 U.S. 1, 22 (1968). Rather, where, as here, police have reports that a crime has been committed and that a particular kind of vehicle was involved, a brief investigation of such a vehicle and its occupants found parked at an isolated place in the vicinity, at a late hour is certainly reasonable especially when the investigation is limited to the request for identification.

Nor was Wolak's act of leaning into the van from his position on the passenger side to retrieve the driver's identification a violation of the Fourth Amendment. On the contrary it was a reasonable act limited in scope to the circumstances which justified the request for identification in the first place. Additionally, the fact that the van doors were wide open belies any reasonable expectation of privacy in the interior exposed to plain view.

CONCLUSION

Petitioner has shown no basis for the issuance of a writ of certiorari and his application should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE

I Lucien Capone, III, one of the attorneys for the Respondent, hereby certify that I have served a copy of the foregoing Brief of Respondent, State of North Carolina, in opposition to Petitioner for Writ Certiorari, on counsel for the Petitioner, in the case of HOWARD KEITH THOMPSON V. STATE OF NORTH CAROLINA (No. 78-1943), by depositing a copy of the same in the United States Mails in a postage pre-paid wrapper addressed as follows:

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